



WISCONSIN SUPREME COURT CALENDAR

May 28, 2002

10:45 a.m.

01-1899

Board of Regents of the University of Wisconsin v.
Wisconsin Personnel Commission et al.

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). This means that the Court of Appeals, rather than issuing its own ruling, asked the Wisconsin Supreme Court to take the case directly. The Court of Appeals certifies cases that cannot be decided by applying current Wisconsin law. The Supreme Court is the state's law-developing court while the Court of Appeals is responsible for correcting errors that occur in the trial court. The case originated in Dane County Circuit Court, Judge Michael N. Nowakowski presiding.

This case centers on what type of information the Wisconsin Personnel Commission is permitted to consider when deciding how to remedy the wrongful firing of a civil service employee. Specifically, the Supreme Court will determine whether the employer can present evidence that the person who was wrongfully discharged engaged in other misconduct at a later date that would have resulted in his/her dismissal anyway – and therefore should be entitled only to limited back pay.

Here is the background: Dale Brenon was a police officer at the University of Wisconsin-Milwaukee (UWM). He was suspended for 10 days for telling racially offensive jokes to co-workers and warned of possible discharge if the conduct continued. Before his suspension began, two women in the department complained that Brenon had harassed them and made sexist/racist jokes and remarks. After a hearing, Brenon was fired.

Brenon appealed his termination to the Wisconsin Personnel Commission, which has the authority under the Wisconsin Statutes to review actions taken by the State of Wisconsin as an employer. The commission generally either hears appeals from employees of employment decisions on such issues as promotion and termination or complaints from employees about working conditions.

While Brenon's case was before the commission, UWM officials discovered that Brenon had copied confidential documents at work and kept them at his home. They wanted to introduce this evidence as well, but the hearing examiner refused to permit questioning about this alleged additional misconduct, finding that it would have unfairly put Brenon in the position of addressing a significant, new issue in the midst of the original case. The commission affirmed the hearing examiner's ruling on this issue, and also affirmed the examiner's findings that (1) the initial 10-day suspension for telling the jokes was too harsh, and (2) discharge for the crude behavior around his female colleagues was also too harsh. The commission said that the appropriate punishment for the jokes was an oral or written reprimand, and that a 10-day suspension would have sufficed for the crude behavior.

The commission ordered Brenon reinstated with \$190,000 in back pay to cover the 27 months between his firing and the final decision. UWM appealed to the circuit court, which affirmed all portions of the commission's decision except for its holding on

the “after-acquired evidence” (the confidential documents that were allegedly copied) of additional misconduct. On this point, the circuit court found that the evidence should have been allowed and noted that UWM still would have had the burden to demonstrate that the wrongdoing was severe enough to merit discharge all on its own.

As noted, the case went to the Court of Appeals, which certified it to the Supreme Court. The Supreme Court will decide whether the Wisconsin Personnel Commission may consider “after-acquired evidence” in ruling on wrongful termination claims.